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No. 79-1631

In the Supreme Court of the United States

OCTOBER TERM, 1980

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,

Appellants,

vs.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE and DEMOCRATIC PARTY OF WISCONSIN,

Appellees.

On Appeal From The Supreme Court of Wisconsin

BRIEF OF APPELLEE DEMOCRATIC PARTY OF WISCONSIN

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QUESTION PRESENTED

Does the First Amendment to the Constitution permit a national political party to veto state law and acts of Congress which determine voter qualification for participation in Federal Presidential Primary Elections?

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BRIEF OF APPELLEE DEMOCRATIC PARTY OF WISCONSIN

STATEMENT OF THE CASE

The Democratic Party of Wisconsin (hereinafter "State Party"), essentially agrees with the Statement of the Case presented by the National Party and the Attorney General of Wisconsin. In addition, the following historical

background of the Wisconsin Open Presidential Preference Primary (hereinafter "Open Primary") is relevant.[1]

Prior to the adoption of the primary system in Wisconsin, nominations took place at caucuses conducted by the political parties pursuant to Wisconsin Election Laws. Nominations were made from the floor. Ballots were then prepared, and the actual selection was made when the persons attending the caucuses marked the ballots in private.

In Wisconsin and elsewhere, dissatisfaction with these party-controlled nominating processes arose at the turn of the century. Direct primary legislation was introduced to replace these party-conducted and controlled caucuses.

> "By the end of the nineteenth century, the reformers' charges against the party bosses and the vested interests who worked with them reverberated throughout the land. It was this rising discontent among the middle class—the small businessman, members of the professions, and the independent farmers—that spawned the Progressive movement. From this protest movement was to emerge the direct primary system and first major reform of the national nominating convention in almost a century—the presidential primary." J. Davis, *Springboard to the Whitehouse* (1967).

In 1897, a bill was introduced for a closed primary in Wisconsin. Assembly Bill 580, Section 5 (1897). This bill did not pass. In 1899, a similar bill was introduced without success. Assembly Bill 393 (1899). In 1901, Assembly Bill 98 was introduced, along with Senate Bill 73. Both of

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[1] All of the material here has been paraphrased from Wisconsin Legislative Reference Bureau, Research Bulletin 75-RB-1, *The Wisconsin Presidential Primary: Open or Closed?*, 5-8 (August, 1975) [hereinafter Research Bulletin 75-RB-1]. Library of Congress No. KSW 2420.L4, 75-1.

these bills contained provisions for closed primaries. Substitute Amendment No. 1 was introduced to the Assembly Bill which provided for an open primary system, abolishing the closed primary requirement that a voter state publicly that he is a party member as a condition to voting. Although this bill passed the Assembly, it was defeated in the Senate. The Senate Bill passed with an amendment that made a primary system optional. Governor Robert M. La Follette vetoed this bill. Ultimately, Substitute Amendment No. 1 to Assembly Bill 98 (1901) was reintroduced and enacted in 1903 as Chapter 451, Laws of 1903. This bill created the first mandatory primary laws in the United States.[2]

The sketchy legislative history surrounding the debate of the Wisconsin Open Primary Law discloses significant concern that any closed system would be unconstitutional, would disenfranchise independent voters or would destroy the Australian ballot which had been recently adopted in 1889. The March 1, 1901 Milwaukee Sentinel reported:

> "It is unquestioned that any act of the legislature which deprives any [otherwise qualified] man of the right to vote at any election . . . is unconstitutional and void. There can be no question but that the primary election contemplated by the Stevens Bill, known as the Primary Election Bill, is an election within the clause of the constitution referred to, since it is an election authorized by law, conducted by public officials, at public expense, and because the public funds can be constitutionally used in this way only on this theory. If this bill does not give an opportunity for

[2] However, as noted in the Bulletin, Florida and Oregon claim this distinction. Florida's law was not mandatory, and Oregon's law was enacted by initiative after Chapter 451, Laws of 1903 was passed but prior to its approval by election held on November 8, 1904. Research Bulletin 75-RB-1, at 7.

> every qualified elector to cast his vote at one or the other of the primary elections to be held for the various parties, then the electors so discriminated against are disenfranchised . . . [E]very step toward the selection of public officers is an essential part of the right to suffrage, since the right to nominate flows necessarily from the right to vote, and nomination and election together constitute the choice of the officer."

Mr. M. G. Jeffries stated at a public hearing held on February 19, 1901:

> "Keep constantly before you that we are considering a particular bill, a bill that has not had the approval of the people or of any convention. Under it to vote at a primary election one must swear that he belongs to a certain party and intends to vote with that party at the next election. What becomes of the young man who has never voted and who cannot swear that he belongs to any party. How about the great floating vote which each party appeals to upon principles? They are both disenfranchised because they cannot swear that they belong to a political party, even though they may intend to vote with it in the future." Research Bulletin 75-RB-1, at 7.

It is further reported that Mayor Rose of Milwaukee expressed his concern that the closed primary would destroy the Australian ballot.

The 1903 law did not specifically address the election of delegates to national political conventions. This aspect of the Wisconsin law was created in Chapter 369, Laws of 1905 when delegates to national conventions were required to be elected in open primaries in Wisconsin.[3]

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[3] The complete historical analysis of the Wisconsin Legislative Reference Bureau regarding the evolution of the Wisconsin Presidential Preference Primary is contained in an Appendix to this brief.

SUMMARY OF ARGUMENT

This case involves a conflict between a Wisconsin law which regulates voter qualifications for a Presidential Preference Primary and a rule of the National Party. The National Party only recognizes delegations to its national convention whose apportionment between the various contenders for the Presidential nomination is determined by the results of either a closed primary, party-conducted caucuses or party conventions. The State of Wisconsin has an open primary. There is no requirement that a voter publicly state party preference as a condition to voting.

The National Party believes it can disregard the results of the Wisconsin Open Primary by claiming rights pursuant to the First Amendment to the United States Constitution as enunciated by this Court in *Cousins* v. *Wigoda,* 419 U.S. 477 (1975). The State Party believes that it enjoys substantial First Amendment rights which are also enjoyed by the National Party. However, the State Party believes that primary elections are federal elections which are subject to control by the state and federal governments. Voter qualifications for federal elections are determined initially by states subject to congressional regulation.

The Constitution recognizes primary elections for President and at various places has established voter qualifications. Additionally, Congress has enacted myriad election laws regulating primary elections for President. To date, Congress has not enacted a law requiring public disclosure of party preference as a condition to casting a primary vote. The National Party is attempting to displace the Congress of the United States. In the absence of congressional action, the Wisconsin Open Primary law is valid.

A state can utilize a wide variety of systems for selecting candidates for public office. If a state chooses to establish a primary system, protected voting rights cannot be denied. Here, Wisconsin has granted full voter participation in the primary process. The National Party wants to impair voting rights.

The State Party believes that the states and Congress can determine voter qualifications for Presidential primary elections as long as the statutory scheme does not unduly infringe upon protected First Amendment rights. In this case, the Wisconsin law is a closely drawn regulation which does not affect the associational rights of the National Party.

The Wisconsin law is narrow in scope because delegates to the National Convention are not elected at the primary. All the primary does is compel the apportionment of delegates from Wisconsin. The delegates themselves are elected at party-conducted caucuses. Participation in the caucuses is limited to persons who publicly subscribe to the general principles of the Democratic Party.

The stated goal of the National Party Rule against open primaries is to prevent dilution of the choice of party identifiers. However, historically, the actual results of the Wisconsin Presidential Preference Primary fairly reflect the division of preferences among Democratic identifiers in the electorate. Indeed, the Wisconsin Open Primary has been singled out by the National Party as demonstrative of a primary electorate which comes close to the Democratic electorate which votes in November.

The National Party threatened to impose a caucus system in Wisconsin to displace the Open Primary. Studies show that less than 4% of the voters participate in caucuses. The National Party is threatening to create a sys-

tem where some citizens' votes count more than other citizens' votes. In this context, the threatened displacement of the Wisconsin Open Primary is similar to the results obtained when states fail to properly apportion.

Generally speaking, citizens have an inherent right to engage in elections. Whenever a state wishes to encumber that right in any way, the burden is upon the state to justify its regulations. The National Party is concerned with crossover voters, i.e., independents and Republican adherents who vote in the Democratic Primary. It is conceded that there is no evidence of raiding in Wisconsin, i.e., Republicans who vote in the Democratic Primary to weaken the choice of the Democratic Party. Generally speaking, Wisconsin voters cast their ballot for the person they want to be President. To date, the Court has only recognized the authority of a state to create closed primaries to prevent raiding. The Wisconsin legislative decision that there is no raiding ought to be respected.

The State Party believes that when it and the National Party engage in Presidential candidate selection, its activities constitute state action. The extensive state entanglement with the party's candidate selection process is obvious. Under any test employed by the Court, state action exists. There can be no serious dispute that states and Congress have the power to regulate a private entity when it engages in such a public function. Thus, the states and Congress have the power to create primary elections and to determine federal voter qualifications despite any party wishes to the contrary.

Decisions of the Court subsequent to *Cousins* v. *Wigoda, supra,* demonstrate that the decision did not provide the National Party with the general power to overturn state law or Acts of Congress which differ from party rules.

States still maintain their historic role of insuring that elections are "conducted in a fair and orderly fashion."

Cousins involved a state court injunction which absolutely prohibited some Illinois citizens from becoming delegates to the Democratic National Convention. It was the scope of the injunction which prompted the Court to find a serious infringement upon the associational rights of the National Party. In stark contrast to the Illinois mandate, the Wisconsin Supreme Court merely prevented the National Party from refusing to seat a Wisconsin delegation on the ground that the delegation was apportioned pursuant to the results of the Wisconsin Open Primary. The Wisconsin Supreme Court and the Wisconsin Legislature do not attempt to regulate how individual delegates are in fact chosen by the State or National Parties.

Obviously, Wisconsin can conduct an open primary. Perhaps the real question is whether Wisconsin can make the results of its Open Primary binding upon Wisconsin delegates to the National Convention. The Court has held that states can enact effective means to achieve its aims. This closely drawn statute and injunction merely make the Wisconsin law effective without impairing any First Amendment rights of the National Party.

ARGUMENT

I.

PRESIDENTIAL PREFERENCE PRIMARIES ARE FEDERAL ELECTIONS WHICH ARE REGULATED BY THE STATE AND FEDERAL GOVERNMENTS.

The National Party hypothesizes in its brief that they are beyond the control of the state and federal governments when they nominate candidates for President and Vice President of the United States. The linchpin of the National Party's position is its claims under the First Amendment to the United States Constitution of freedom to associate as expressed in its perceptions of the scope of *Cousins* v. *Wigoda,* 419 U.S. 477 (1975).

The State Party believes that there are substantial First Amendment rights which it enjoys and which are enjoyed by the National Party. However, the State Party believes that there is a significant distinction which must be drawn when a political party acts in its private political capacities as opposed to those instances when a political party acts in its public capacities. The State Party believes that when it acts in its private political capacities, it is virtually beyond all control of the government; this is the precise holding of *Cousins.* However, in the United States, political parties often perform significant public functions.

In Wisconsin, recognized political parties[4] appoint elec-

[4] The term "recognized politcal party" is used to describe a political party which has demonstrated sufficient voter support under Wisconsin law thereby allowing it to participate directly in govern-

(footnote continued)

tion officials, § 7.38(1), Wis. Stats.; appoint election observers, § 7.38(1), Wis. Stats,; have direct representation on the State Elections Board, § 15.61, Wis. Stats.; participate in the appointment of the Board of Election Commissioners in Milwaukee, § 7.20, Wis. Stats.; determine the names of candidates who appear on the Wisconsin Presidential Preference Primary Ballot, § 8.12(1)(a), Wis. Stats., J.S. App. A at 55a-56a; and recognized political parties have automatic ballot access with the ballots containing the party names, §§ 5.62(1) J.S. App. A at 50a-51a and 8.16(7), Wis. Stats.

The most significant point of interface between the public and private roles of a political party is at a primary election. One of the questions presented is whether political parties have absolute control over primary elections concerning candidates for President. The State Party believes that it is beyond any dispute that primary elections are federal elections which can be controlled and regulated by the United States Constitution, Acts of Congress and state law.

The Twenty-fourth Amendment to the Constitution specifically recognizes that primary elections for President are public elections:

> "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President,

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(footnote continued)

ment activities. It usually means a party which has maintained a vote of at least 1%. § 5.62(1)(b), Wis. Stats. J.S. App. A at 50a-51a. *See also,* §§ 5.02(13) J.S. App. A at 43a, 8.17 and 8.175, Wis. Stats. Ballot access in the first instance is governed by Section 5.62(2), Wis. Stats. J.S. App. A at 51a. *See* § 8.16(4), Wis. Stats. A 10% vote is necessary to obtain representation on the Elections Board. § 15.61, Wis. Stats.

> or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

It is beyond doubt that the Fifteenth Amendment to the Constitution prohibits excluding blacks from primary elections for President of the United States. *See* Brief, *infra*, at 15-16, 32. Women cannot be excluded from the nominating process, Nineteenth Amendment. Eighteen year olds cannot be excluded, Twenty-sixth Amendment.

Congress recognizes that Presidential primary elections are federal elections. For example, The Overseas Citizens' Voting Rights Act of 1975 defines a "federal election" as:

> "any general, special or primary election held solely or in part for the purpose of selecting, nominating, or electing any candidate for the office of the President, Vice President, Presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Resident Commissioner of the Commonwealth of Puerto Rico, Delegate from Guam, or Delegate from the Virgin Islands." 42 U.S.C. § 1973 dd(1).

That definition is nothing more than the most recent recognition by Congress that Presidential Preference Primaries are federal elections which Congress can regulate. Wisconsin law which protects federal overseas voting is applicable to the Wisconsin Presidential Preference Primary. § 8.24(2), Wis. Stats. Title 42 U.S.C. § 1971(d) provides federal protection from intimidation, threats or coercion with respect to primary elections for the office of President of the United States. Title 42 U.S.C. § 1973i(c) outlaws the giving of false information upon registering for, *inter alia*, "primary elections held solely or in part for the purpose of selecting or electing any candidate for

the office of President, Vice President, Presidential elector. . . .'' Title 42 U.S.C. § 1973i(e)2 makes an identical reference with respect to prohibiting voting more than once. State officials are required by federal law to retain presidential primary election records. 42 U.S.C. § 1974.

Likewise, the federal criminal code contains various regulations of presidential elections at 18 U.S.C. § 591, *et seq.* Election is defined as follows:

> '' 'election' means (1) a general, special, primary, or runoff election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, or (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President.'' 18 U.S.C. § 591(a). *See also,* 18 U.S.C. § 601(b)(2).

In this chapter, Congress then proceeds to provide federal protection for voters and closely regulates tactics used in campaigns for President, including primaries.

The Presidential Primary Matching Payment Account Act, 26 U.S.C., § 9031, *et seq.* defines a ''candidate'' as:

> ''an individual who seeks nomination for election to be President of the United States. For purposes of this paragraph, an individual shall be considered to seek nomination for election if he (A) takes the action necessary under the law of a State to qualify himself for nomination for election, (B) receives contributions or incurs qualified campaign expenses, or (C) gives his consent for any other person to receive contributions or to incur qualified campaign expenses on his behalf.'' 26 U.S.C. § 9032(2).

''Primary election'' is defined as:

> ''an election, including a runoff election or a nominating convention or caucus held by a political party, for the selection of delegates to a national nominating con-

> vention of a political party, or for the expression of a preference for the nomination of persons for election to the office of President of the United States." 26 U.S.C. § 9032(7).

It thus seems abundantly clear that presidential preference primaries, when provided by states, are considered by the Constitution and the Congress to be federal elections subject to both direct constitutional control and congressional regulation.

With respect to federal elections, it is generally conceded that the Constitution authorizes states in the first instance to determine voter qualifications. However, "(w)ith respect to elections to federal office . . . the Court has held that Congress has power to establish voter qualifications." *Kusper* v. *Pontikes,* 414 U.S. 51, 57 n. 11 (1973), citing *Oregon* v. *Mitchell,* 400 U.S. 112 (1970).

Wisconsin has determined that in all federal primary elections, including the presidential preference primary, Wisconsin voters are entitled to vote without publicly disclosing party preference as a condition to voting. Congress has not established different voter qualifications.

It is the position of the National Party that all its rules and regulations concerning voter qualifications are in all respects superior to the law of Wisconsin. The National Party thereby presumes to displace the Congress of the United States.[5] While Congress, in many instances, has

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[5] Indeed, the National Party believes that any action of Congress regulating the nominating process, including Congressional creation of regional primaries or national primaries constitutes "interference" or "intrusion" into party affairs. Presumably, the National Party believes that it possesses the absolute power under *Cousins* to overturn Acts of Congress which attempt to regulate the selection of candidates for President. See *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party,* Exhibit 4 at 31-38, J.A. 61-70.

exercised its power to determine voter qualifications for primary elections for President, it has declined to date to institute closed primaries for federal offices. In the absence of Congressional action, the Wisconsin open presidential primary law is valid.

II.

THE FIRST AMENDMENT CLAIMS OF THE NATIONAL PARTY ARE OVERSTATED; COUSINS v. WIGODA IS INAPPLICABLE.

The National Party, relying primarily upon *Cousins* v. *Wigoda,* 419 U.S. 477 (1975), claims a virtual monopoly on determining voter qualifications for its nominating process. The National Party claims power under the First Amendment and *Cousins* to overturn any law of any state or Congress which deviates from the policies of the National Party.

While there can be no doubt that political parties enjoy substantial First Amendment rights and privileges, those rights are not absolute. It is the position of the State Party that there are a significant number of activities of a political party which are completely immune from state or federal regulation. In the context of a National Convention, these include the absolute right of the National Party to determine its positions on matters of public policy. The National Party under *Cousins* has absolute authority to create rules and objectives with respect to sex, race, age, religion, economic status and ethnic origin of delegates and alternates and compel complete compliance with them. Furthermore, the State Party believes that if it and the National Party merely endorsed candidates for public office, both would be completely immune from governmental regulation concerning the endorsement process.

However, neither the State Party nor the National Party performs a mere endorsement role in the political process. The Democratic Party of Wisconsin engages in significant state activities and its name appears on the ballot. The Presidential and Vice Presidential candidates of the National Party obtain automatic ballot access and party identification in Wisconsin. Under these circumstances, the purely private role of the State Party and the National Party have an interface with a public role when they determine candidates for state and national offices. That interface takes place at primary elections in Wisconsin. The State Party believes that at that point of interface, and only at that point, the public interest in determining the qualifications of electors far outweighs any claimed First Amendment right asserted by the National Party.

As pointed out in the last section, the Constitution and Congress have recognized that primary elections with respect to federal offices are an integral part of the federal election process. These enactments have confirmed prior decisions of the Court that primary elections are integral parts of the total election process. *Storer* v. *Brown,* 415 U.S. 724, 745 (1974); *Terry* v. *Adams,* 345 U.S. 461, *reh. denied* 345 U.S. 1003 (1953); *Smith* v. *Allwright,* 321 U.S. 649, *reh. denied* 322 U.S. 769 (1944); *United States* v. *Classic,* 313 U.S. 299 (1941); *Nixon* v. *Condon,* 286 U.S. 73 (1932); *Nixon* v. *Herndon,* 273 U.S. 536 (1927); *Newberry* v. *United States,* 256 U.S. 232, 286 (1921).

Even though primary elections are an integral part of the election process, there is no Constitutional or Congressional requirement compelling the holding of primaries. Thus, states are free to choose whether the nominating process will be determined by primary election or by other means such as caucuses. However, if a primary is utilized,

then no state can deny protected voting rights. In *United States* v. *Classic,* 313 U.S. 299, 318 (1941), the Court stated:

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article 1, Sec. 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative."

A state has a wide range of choices. Since the Constitution does not provide for political parties, *Elrod* v. *Burns,* 427 U.S. 347, 369 (1976), a state could abolish identifying political parties on the ballot.[6] In such a political scheme, political parties would merely endorse candidates and work in support of such candidates.[7] In the event a state chooses a primary system where a political party has name identification on the ballot, it is up to

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[6] Wisconsin has abolished party identification with respect to judicial and school offices, Laws of 1913, c. 492, sec. 31; city offices, Sp. S 1912, c. 11; § 35-20, Wis. Stats. (1912); and other county and municipal offices. *See* Laws of 1951, c. 455. These elections are "nonpartisan." *See* §§ 5.60 and 8.05, Wis. Stats. (1977), J.S. App. A at 45a-50a and 52a-55a. Political parties may endorse candidates, if they wish.

[7] On the other hand a state can allow the name of a political party to appear with the name of a candidate, presumably to enlighten voters and to avoid confusion in the election process. *See Bullock* v. *Carter,* 405 U.S. 134, 145 (1972) cited with approval in *Storer* v. *Brown,* 415 U.S. 724, 732-33 (1974).

the states to determine voter qualifications subject only to the limitations imposed by the Constitution, and further subject to Congressional regulation with respect to federal elections.

When any election is conducted, the general constitutional proposition is that complete and unfettered voter access is the rule and any voter impairment is the exception which must be justified by the state.

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. [cites omitted] This 'equal right to vote,' Evans v. Cornman, supra, at 426, is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. [cites omitted] But as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'' *Dunn* v. *Blumstein,* 405 U.S. 330, 336 (1972).

In this context, certain restrictions are allowed. A state may, but is not required to, impose a reasonable registration system to prevent voter fraud. A state may, but is not required to, create reasonable residency requirements to prevent voter fraud and to restrict state elections to state residents. Contribution limits can be established to protect the integrity of elected officials. *Buckley* v. *Valeo,* 424 U.S. 1 (1976). Political organizations can be required to disclose their sources of funds for the same reasons. *Id.* And, with respect to primary elections, a state *may* if it chooses establish a public declaration of party affiliation as a prerequisite to voting in a party primary to prevent raiding. See *Rosario* v. *Rockefeller,* 410 U.S. 752 (1973), and *Kusper* v. *Pontikes,* 414 U.S. 51 (1973). The National

Party asserts that a state *must* establish such a restriction upon the voting franchise when demanded by a political party.

The State Party believes that, absent Congressional intervention, a state can create an open primary system under the circumstances present in this case. The State Party believes that the Wisconsin Presidential Open Primary Law is a very limited law. The State Party further believes that the National Party, in order to invalidate a state law under a claim of an infringement of its First Amendment rights, must prove that there is in fact an interference with its First Amendment rights. In any event, the State Party believes that where voter qualifications are determined, there is public activity and political parties can be highly regulated so long as the regulation does not spill over into areas protected by the First Amendment.

A. The Wisconsin Open Primary Statute is a Closely Drawn Regulation.

Delegates to the Democratic National Convention are not elected at the Wisconsin Open Primary. All the Wisconsin Open Primary does is create a system whereby a determination is made regarding the preferences of the citizens of the State of Wisconsin for the office of President of the United States. It is the only election where all of the potential candidates for President are listed and where the citizens are provided with the unique opportunity to vote for the persons they believe to be the most qualified for that office. In the November elections, the citizens' choice is limited to the candidates nominated by the political parties.

The results of the Wisconsin Presidential Preference Primary are used for the limited purpose of apportioning delegates to the various Democratic candidates for Presi-

dent by the State Party. The actual selection of delegates commences at Congressional district caucuses organized by the State Party. The only participants in the actual selection of delegates to the national conventions are persons who are willing to subscribe to the general principles of the Democratic Party and do so publicly by executing an appropriate statement to that effect. The participants in the caucuses are then separated into groups composed of persons who support the various candidates for President. Within these groups, the participants additionally declare their adherence to the party and pledge their support to the particular candidate for President. It is in these candidate caucuses, composed of persons who have publicly declared that they adhere to the principles of the Democratic Party and who further declare their support for the particular candidate involved, where the actual delegates and alternates to the national convention are selected.

All the delegates and alternates chosen at these Congressional district caucuses then meet to elect the at large delegation through a procedure which is also in complete compliance with the Democratic National Committee rules and objectives. This process is in full compliance with the National Party's rules and regulations with respect to the sex, race, age, religion, economic status and ethnic origin of the delegates as well as the rules regarding notice, timing of selection and slate-making.

Thus, the interests of the State of Wisconsin in assuring fair and orderly elections is achieved in a closely drawn manner. The only impact upon the delegate selection process imposed by the Wisconsin Open Primary is to apportion the delegates to the various contenders for the Democratic nomination for President.

B. The Wisconsin Open Primary Law Does Not Abridge Any of the Associational Freedoms of the National Party.

The Wisconsin Supreme Court recognized that the appellants had the burden of proving a substantial burden upon their associational rights. Opinion of Wisconsin Supreme Court, J.S. App. A at 18a, *State ex rel. La Follette* v. *Democratic Party,* 93 Wis. 2d 473, 499, 287 N.W. 2d 519, 530 (1980), relying on *Marchioro* v. *Chaney,* 90 Wash. 2d 298, 582 P.2d 487, 493 (1978), *aff'd* 442 U.S. 191 (1979) and *American Party of Texas* v. *White,* 415 U.S. 767, 790 (1974). The only significant difference between the Wisconsin Open Primary and other means of apportioning delegates to the Democratic contenders for President is that the Wisconsin Open Primary Law does not require persons to publicly state and have recorded their party preference as a prerequisite to voting. Stipulation of Facts, ¶¶ 18-19, J.A. at 26-27.

The principal reason advanced by the National Party for its opposition to the Wisconsin Open Primary is that there exists a potential for crossover[8] voting which might dilute the votes of Democratic Party adherents. The National Party has recognized that there is no evidence to show the existence of "raiding", i.e., Republican identifiers who vote in Democratic primaries for purposes of weakening the choice of the Democratic Party. See *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party,* Exhibit 4 at 68, J.A. 7172. (hereinafter the Winograd Report). Also, *see* Skornicka, *State Action in Presidential Candidate Selection,* 1976 Wis.

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[8] Crossover in this context means independent voters who do not have any allegiance to either political party and Republicans who from time to time vote in Democratic primaries. *See* Part C, *infra.*

L. Rev. 1269, 1301-1303. Thus, the National Party opposes open primaries because it is concerned with the *possibility* of a delegation being chosen "which did not fairly reflect the division of preferences among Democratic identifiers in the electorate." Winograd Report at 68, J.A. 72. While that position reflects interesting theory, the fact of the matter is that the statewide outcome in Wisconsin has not been affected to date by crossover voting. See Skornicka, *supra*, at 1302-1303 n 206.

Significantly, none of the procedures which are acceptable to the National Party for apportioning delegates among various candidates produces convention participants which come close to fairly reflecting the statistical makeup of "Democratic identifiers in the electorate". Indeed, the Wisconsin Open Primary might be the procedure which most accurately reflects the beliefs of all Democratic identifiers in the general electorate. In any event, there is no factual basis for concluding that the Wisconsin Open Primary materially interferes with the associational goals of the Democratic Party of the United States.

The Winograd Report at 10-23, J.A. 47-57 contains an extensive study of the various systems ultilized for apportioning delegates. The Wisconsin Open Primary is also analyzed there. It is clear from these studies that closed primaries, caucuses and conventions, as well as the Wisconsin Open Primary, have participants which vary significantly from the overall statistical profile of persons who vote for the Democratic candidate at the general election. Generally speaking, all of these methods of delegate apportionment, regrettably, produce participants who are better educated, wealthier, whiter, and younger than the Democratic identifiers who vote in the November elections. *Id.* The rank and file Democratic voter is significantly underrepresented in all systems utilized for ap-

portioning delegates. In summarizing this data, the Wisconsin Supreme Court concluded: "Wisconsin's Open Primary produces an electorate which is as representative (or as unrepresentative) of 'Democratic identifiers in the electrate' as is the electorate produced by closed primaries and caucuses which are acceptable to the National Party." Opinion of Wisconsin Supreme Court, J.S. App. A, at 26a, 93 Wis.2d at 508, 287 N.W.2d at 534.

Indeed, in many statistical categories, the Wisconsin Open Primary produces a more representative electorate when compared to general election Democratic voters than any other system for apportioning delegates. For example, at page 14 of the Winograd Report, J.A. 54-55, it is stated:

> "Limited evidence on 1976 suggests that while there may be a slight tendency for conservatives to be underrepresented in Democratic primary elections (due to the fact that the overrepresented, college educated tend to be more liberal), the two electorates may not be as distant as they were in 1972. For instance, the Wisconsin primary electorate had fewer people classifying themselves as conservatives but about the same number classifying themselves as liberals in the general electorate."

Here, Wisconsin's Open Primary is singled out as demonstrative of a primary electorate which comes close to the Democratic general electorate in November. Such a result is hardly adverse to the associational rights of the National Party. The Wisconsin Supreme Court realistically evaluated the facts and found no interference.

There is more than one way to dilute the preferences of Democratic Party adherents. The National Party would have imposed a caucus system on Wisconsin in 1980 had the Wisconsin Supreme Court failed to act. A caucus sys-

tem represents the most serious dilution of the preferences of Democratic Party adherents. Studies from other states demonstrate that very few voters participate in caucuses. Less than 4% of the voters engage in such proceedings, and those who do participate are completely unrepresentative of the rank and file of the Democratic Party. *See* the Winograd Report at 15, J.A. 56-57. In 1980, in Michigan, the Democratic Party displaced the statutory open primary with a closed caucus. Only 15,000 people in Michigan determined the presidential preference wishes of all Democratic voters in the entire state. See *New York Times,* April 27, 1980, at 1, col. 2. Many Demorcratic adherents are excluded from participation in this crucial part of the electoral process by the mere fact that the vast majority of them do not participate in caucuses. The preferences of Democratic adherents are diluted by nonparticipation.

In this context, the position of the National Party is not unlike the position of those states which failed to reapportion and thereby created a situation where some citizens' votes counted more than other citizens' votes. Since there is in fact no way that the National Party can compel the Wisconsin Legislature to enact a law which accommodates the predilections of the National Party, the actual choice presented to the Wisconsin Supreme Court was whether Wisconsin's open primary or a small number of party adherents in caucuses would determine the apportioning of Wisconsin delegates to the Democratic convention. Wisconsin was faced with the threat that only the vote of an extremely small number of citizens participating in caucuses would count while the votes of the many who participated in the open primary would be totally ineffective. The threat to equal voter participation in the election process was as great or greater than the results which obtain when a state fails to properly apportion itself. The

rationale of *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964) is fully applicable here:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The dissent of Mr. Justice Douglas in *South* v. *Peters,* 339 U.S. 276 (1950) was cited with approval in *Reynolds* v. *Sims,* 377 U.S. at 555 n. 29 and is particularly appropriate.

> "There is more to the right to vote than the right to mark a piece of paper and drop it in the box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted."

When the results of the Wisconsin Open Primary are pitted against those of a caucus, it is clear that in a caucus votes of Democratic adherents are diluted by the simple fact that less people participate in caucuses. The Wisconsin Supreme Court, when faced with that choice, correctly opted for a full participatory system. That choice posed no threat to the associational objectives of the National Party and clearly protected citizen access to the Presidential nominating process.

Another feature of the Wisconsin Open Primary which demonstrates that it does not interfere with the associational rights of the National Party is the fact that the delegates chosen in party caucuses by publicly declared

Democrats are only required to vote for the candidates apportioned by the open primary on the first ballot and "on any additional ballot, unless released by said candidate, [or] until said candidate fails to receive at least one-third of the votes authorized to be cast. . . ." § 8.12(c)(5), Wis. Stats.; J.S. App. A, at 58a-59a.

The National Party theorizes that the Wisconsin Open Primary could have an adverse impact upon the candidate selection process at its national convention. Just what that impact might be, however, is not only impossible to identify, but apparently is hard to describe. If the Wisconsin Open Primary delegation helps a first ballot nomination, then, obviously, the Wisconsin open primary results are significantly in accord with other Democratic voter preferences from all over the country and can in no way be said to have interfered with the National Party. Should the balloting proceed beyond the first ballot, the Wisconsin delegates who were pledged to a candidate who did not receive at least one-third of the delegate votes from all national convention delegates in the first ballot are released under Wisconsin law to "vote according to [their] own judgment." *Id.* The 1980 National Party Rules only required bound delegates for the first ballot.[9] Under either rule delegates would become uncommitted. Since the

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[9] Although the stipulation asserts that the only difference between the Wisconsin Open Primary and the 1980 Rules for the National Convention is that the voters in the primary are not required to publicly state their party preference as a prerequisite to voting, the fact is that there is one difference.

National Party rules required a candidate to receive either 15%, 20% or 25% of the vote as a prerequisite to obtaining any delegates. Winograd report, at 54. Wisconsin law compels a party either to a winner-take-all election or a complete apportionment. The rationale of the National Party is that only serious candidates with

(footnote continued)

delegates themselves are all chosen in full compliance with the rules of the National Party, it is difficult to conceive of any set of circumstances in which the open primary of Wisconsin would as a matter of fact interfere with the nomination process.

The National Party attempts to overcome this evidence by showing that persons who in the past have considered themselves to be independent have voted differently in Wisconsin than persons who have considered themselves to be Democrats. See Brief for Appellants, at 29-32. The principal support for this assertion is Adamany, *Cross-over Voting and the Democratic Party's Reform Rules,* 70 Am. Pol. Sci. Rev. 536, 540 (1976). Brief for Appellants, at 30. However, even a cursory review of that article exposes its unreliability. The samplings taken by the author were extremely small and subject to great error. The author himself states that "[i]n any case, the survey reports of candidate voting must be treated cautiously in the . . . . analysis." Adamany at 537.

The 1964 election is completely unrealistic because Governor George Wallace was not pitted against the incumbent

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(footnote continued)

substantial backing should obtain delegates to the National Convention.

Although these issues are not before the Court, the State Party believes that it and the National Party, just as a state, are entitled "to prevent the clogging of its election machinery, [to] avoid voter confusion and [to] assure that the winner is a choice of a majority, or at least a strong plurality of those voting . . . [And that it] has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock* v. *Carter,* 405 U.S. 134, 145 (1972). In addition, the State Party believes that it and the National Party just as a state have a "substantial . . . interest" in encouraging compromise and "political stability" as a part of its freedom of association. *Storer* v. *Brown,* 415 U.S. 724, 729 (1974).

President, Lyndon Johnson. Instead, Wisconsin Governor John W. Reynolds ran as a favorite son. The George Wallace vote was undoubtedly a reflection of a certain amount of voter dissatisfaction with Governor Reynolds. That primary exposed a weakness in the Wisconsin law which was corrected. In 1966, the legislature abolished favorite sons by limiting ballot access to persons who are considered serious contenders for party nominations. Laws of 1965, ch. 666, sec. 1.

Perhaps the most serious fallacy in the National Party's reasoning is that it fails to show that the results of the Wisconsin Open Primary would differ significantly from the results of a closed primary system which the National Party would approve. The National Party rules do not require any particular preregistration system. All that the National Party requires is a public recording of party preference as a precondition for voting. Under Rule 2A, Wisconsin would be free to merely require this statement at the time of voting. Crossover voting would not be prevented by such a system. Any person of any political persuasion would be eligible to vote in the Democratic primary if that person would merely be willing, for the purpose of that one election alone, to state that the Democratic ballot is preferred for that election. None of the data or analysis presented by the National Party have even attempted to show whether requiring public disclosure would prevent independents from voting in the Democratic primary or would even prevent some Republicans from voting in the Democratic primary.

The actual results of the Wisconsin primary since 1964 support the conclusion that the Wisconsin results are similar to those obtained in closed primaries or caucuses. In 1968, Senator Eugene McCarthy won the Wisconsin primary. That choice was probably consistent with the

results of closed systems.[10] In 1972, Senator George McGovern won the Wisconsin primary. He ultimately became the nominee of the party on the first ballot. Yet, the National Party incredibly seems to argue that the results of the Wisconsin primary were not representative of the choice of Democratic adherents. President Jimmy Carter won the Wisconsin primary in 1976 and won the Wisconsin primary in 1980 by a substantial margin; and obviously, obtained the nomination on the first ballot both times.

The Wisconsin Supreme Court correctly recognized that there was no impact upon any of the associational rights of the National Party. Since that is the case, the National Party is presenting a theoretical problem to the Court. As noted recently in another setting, theoretical problems which are not in accord with reality do not merit interference with state law. *See Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* ..... U.S. ....., 100 S.Ct. 1223, 1236 (1980). In reality, there is no impact upon the associational rights of the National Party and, therefore, the decision of the Wisconsin Supreme Court declaring that the associational rights of the National Party are not impaired is in accord with decisions of the Court and should be affirmed.

C. The Court Has Never Expressly Authorized States To Impair Voter Access For Purposes Of Controlling Crossover Voting.

"Raiding" is the term used to define party adherents who vote in a primary of another party for purposes of weakening the choice of the other party. It is to be distin-

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[10] At the time of the Wisconsin primary, President Johnson had just withdrawn from contention and Senator Robert Kennedy had just entered the race, but was not on the ballot. *T. White,* The Making of the President, 1968, 130, 141 (1969).

guished from the term "crossover" which means independent voters who vote in a party primary and party adherents who from time to time vote in other party primaries. *Rosario* v. *Rockefeller, supra,* and *Kusper* v. *Pontikes, supra,* only authorized party registration as a prerequisite to voting to prevent raiding. It does not follow that a state must conclude that raiding is a serious problem, or that a state must act to prevent raiding. Here, the National Party concedes that there is no evidence of raiding. Winograd Report, Exhibit 4 at 68, J.A. 71-72. The National Party is not concerned with raiding. It is only concerned with crossover voters who vote in the Democratic primary for a candidate they want to be President. To date, the Court has not recognized the power of a state to impair voting rights to prevent crossover voting.

Recently the Supreme Court of Washington upheld its blanket primary.[11] *Heavey* v. *Chapman,* 93 Wash.2d 700, 611 P.2d. 1256 (1980). On this point, that Court said:

> "We believe the failure of plaintiffs even to attempt to show a substantial burden to their right of association is dispositive of the case. Nonetheless, consideration should be given to two recent cases cited by plaintiffs which deal with primary elections: *Rosario* v. *Rockefeller,* 410 U.S. 752, 36 L.Ed.2d 1, 93 S.Ct. 1245 (1973), and *Nader* v. *Schaeffer,* 417 F.Supp. 837 (D. Conn. 1976), *aff'd,* 429 U.S. 989, 50 L.Ed.2d 602, 97 S.Ct. 516 (1976). Both of these cases concerned the exclusion by statute of voters from participating in party primaries. In neither case was the situation similar to those where the statutes in issue do not restrict but rather open the primary for full participation by all citizens. As pointed out in *Nader,* there are a number of actions a state legislature may take to preserve '"the integrity of the electoral process"'.

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[11] In a blanket primary, a voter is allowed to alternate votes between political parties when primary votes are cast for more than one office.

> *Nader,* at 846. *See Rosario* v. *Rockefeller, supra.* But there is no constitutional requirement that these actions be taken; rather it is not unconstitutional if they are taken.
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> * * *
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> *Nader* and *Rosario* hold that a state *may,* if it chooses, institute a closed primary system. *But see Kusper* v. *Pontikes,* 414 U.S. 51, 38 L.Ed.2d 260, 94 S.Ct. 303 (1973). *Nadar* and *Rosario* neither establish any mandatory duty that a state *must* have closed primaries nor do they forbid a blanket primary." 611 P.2d at 1258-1259.

It is clear that Wisconsin does not consider raiding to be a problem. The National Party does not consider raiding to be a problem. Citizens should only be excluded from the nominating process when there is a legislative finding that raiding is an actual threat to the nomination process. A legislative finding either way ought to be respected and surely ought not be disturbed where it is conceded that no raiding exists.

D. A Political Party Engages in a Public Function When It is Involved in a Nominating Election and is Subject to Significant State or Federal Regulation With Respect to the Conduct of the Election.

The National Party is essentially a private asscociation, but when it engages in presidential candidate selection, its activities become so imbued with state action that a broad panoply of rights, regulations and responsibilities necessarily become applicable. This issue was expressly reserved by the Court in *Cousins* v. *Wigoda,* 419 U.S. 477, 483 n. 4 (1975) and earlier avoided in *O'Brien* v. *Brown,* 409 U.S. 1 (1972). This case presents a situation which permits its examination and resolution.

The extensive state entanglement with the parties' candidate selection process is obvious, and the conclusion is in-

evitable: the parties perform a fundamental and critical public function when they nominate candidates for president; when they do so it is in a manner which, as a totality, is so intertwined with the state that they are unable to avoid those aspects of state regulation, which, if imposed, are directed toward compelling state interests.

The state entanglement with parties' nomination processes originates in the Constitutional delegation to states of the responsibility to determine the time, place and manner of selecting presidential electors. U.S. Const. Art. II, § 1. *See also, Burroughs & Cannon* v. *United States,* 290 U.S. 534, 544 (1934). Under this extensive grant of power, states pass comprehensive and complex election codes regulating in substantial ways the registration and qualification of voters and the elections and qualifications of candidates. *See Storer* v. *Brown,* 514 U.S. 724, 730 (1974). State statutes in turn delegate some of this power to political parties via voter qualification statutes which require party affiliation or declaration of party preference as a prerequisite for voting in primaries. When there are affiliation or declaration statutes, the parties alone set the criteria. (In fact, this is a critical aspect of their constitutional rights to associate.) It is the party that determines the principles and philosophies which become the basis for the affiliation. The state accepts these party-established criteria for the affiliation and implements and effectuates them when it conducts the primary election.

In addition, all states have ballot access statutes. In states with presidential primaries, substantial requirements are placed on candidates running in those partisan primaries. *See generally,* Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1175-79 (1975). As in the case of affiliation and disclosure statutes, these state-imposed requirements on primary candidates are enforced

by the state. They vary from state to state and usually concern filing certain declarations. Of greatest significance, however, is the automatic ballot access granted by all states to candidates who ultimately obtain their party's nomination. The state sanctions the winners of the party's candidates selection process by granting them direct access to the general ballot. Through ballot access statutes the states rely upon political parties to perform part of the function of selecting candidates and gives them the force of law.

The Court has found state action in primary elections. *Terry* v. *Adams,* 345 U.S. 461, *reh. denied* 345 U.S. 1003 (1953); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Nixon* v. *Condon,* 286 U.S. 73 (1932); and *Nixon* v. *Herndon,* 273 U.S. 536 (1927). In these *White Primary Cases,* this Court announced that "any part of the machinery for choosing officials" becomes state action and subject to the Constitution's restraints. *Terry* v. *Adams,* 345 U.S. at 481; *Smith* v. *Allwright,* 321 U.S. at 664.

This state action can still be found in primary elections under two separate, currently viable, state action doctrines, the "public function doctrine," articulated in *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 352 (1974) and *Flagg Bros.* v. *Brooks,* 436 U.S. 149, 158 (1978), and the "sufficient contacts" doctrine articulated in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 721 (1961).

In *Jackson,* the Court identified two lines of the "sufficient contacts" doctrine, one emerging directly from *Burton,* which finds state action via a weighing of the totatlity of the circumstances forming a symbiotic relationship between the private activity and the state; and the second emerging from *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 176-77 (1972). The latter requires an examination of the specific point of contact between the state

and the challenged actvity which must reveal a sufficiently close "nexus", i.e., the state itself actually fosters and encourages the activity. Under both lines, primary elections—the point of interface between the state and the party—constitute state action.

In *Burton,* the Court summarized state action as follows:

> "The State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the 14th Amendment." 365 U.S. at 725.

The *Burton* test is satisfied if there is an interdependent, symbiotic relationship between the state and the private entity. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 175 (1972).

The intertwining of the National Party and Wisconsin is obvious. The detailed regulation of primary elections "makes the party which is required to follow these legislative directions an agency of the state so far as it determines the participants in a primary election." *O'Brien* v. *Brown,* 409 U.S. 1, 13 (1972) (Marshall, J., dissenting on the issue of timeliness). The National Party's desire to have delegates representative of Wisconsin citizens coupled with the automatic access to the general election ballot awarded the nominee, demonstrate the interdependence of the National Party and Wisconsin. Mr. Justice Marshall's comments in his dissenting opinion in *O'Brien* are particularly appropriate:

> "For so long as the State recognizes and adopts the fruits of the primary . . . then the State has made that primary an integral part of the election process, and

> infused the primary with state action. . . ." *O'Brien*, 409 U.S. at 13.

Mr. Justice Marshall noted that where the presidential primary election is by law the first step in a process designed to select a candidate for President, the state is "intertwined in the process at every step" and thereby fulfills the *Burton* sufficiency of contacts/totality of circumstances standard for finding state action. *O'Brien*, 409 U.S. at 13. In *Gray* v. *Sanders*, 372 U.S. 368, 374 (1963), the Court utilized the totality of circumstances approach and found that extensive state involvement in the primary phase of an election constituted state action.

In *Moose Lodge*, the Court articulated the "nexus" analysis, an alternative variety of the "sufficient contacts" approach to state action. It requires a scrutiny narrowly focused on the specific aspect of private activity which is challenged. The state must be so intimately involved in the activity that the state itself could be said to have required, encouraged or enforced the activity and become a joint participant in it. It is not required that the activity originate with the state in order to be state action. The state must only have "significantly involved itself." 407 U.S. at 173. The nexus analysis does not take place in the abstract; it may proceed only in the context of the particular act or practice alleged to constitute state action.

The critical state action issue in this case goes to that particular moment in the presidential candidate selection process when the state conducts the presidential preference primary. At that moment, state-paid election officials and party-supplied, state-paid poll workers conduct the election. Herein lies the crucial *Moose Lodge* "nexus" between the state and party. It is the point of contact or interface.

The public function, state action doctrine is premised on the theory that when a private entity is engaged in activity of a public or quasi-public nature, state action is present. *Marsh* v. *Alabama,* 326 U.S. 401 (1946). Implicit in a public function finding is a recognition of the uniquely public purpose of an ostensibly private activity. The selection of the decision makers in a democratic society meets this test.

The Wisconsin Presidential Preference Primary is designed to serve a most fundamental interest of the state. The purpose and effect of the primary activities is preservation of the essence of the democratic system. As stated in Justice Pitney's concurring opinion, in which Justices Brandeis and Clarke joined, in *Newberry* v. *United States,* 256 U.S. 232 (1921):

> "[I]t seems to me too clear for discussion that primary elections and nominating conventions are so closely related to the final election, and their proper regulation so essential to effective regulation of the latter, so vital to representative government, that power to regulate them is within the general authority of Congress."

See also, Irish v. *Democratic Farmer-Labor Party of Minn.,* 287 F.Supp. 794, 804 (D. Minn. 1968) and *Maxey* v. *Washington State Democratic Comm.,* 319 F.Supp. 673 (W.D. Wash. 1970).

It seems beyond any serious dispute that the state has the power to regulate a private entity when it engages in a public function. Therefore, the state and Congress have the power to create and regulate primary elections[12] and

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[12] The full extension of the National Party's position is that political parties could nominate its state office candidates or elect delegates to the National Convention at a caucus even though a state created a closed primary.

to determine federal voter qualifications despite any party wishes to the contrary.

E. Cousins v. Wigoda is Inapplicable.

One of the principal questions is whether the Court in *Cousins* v. *Wigoda,* 419 U.S. 477 (1975) held that all state laws which affect the Presidential candidate selection process are overruled when the state laws conflict with National Party regulations. *Cousins* itself in the majority opinion recognized the legitimacy of states protecting the electoral process of its citizens. 419 U.S. at 489. Although the majority opinion limited that power when applied to the process by which candidates for national office are nominated, the concurring opinions specifically observed the important role of the states in regulating elections and these concurring opinions further observed that the Constitution itself directs states to choose electors who ultimately cast the votes for President and Vice President of the United States. 419 U.S. at 491, 495-497.

The facts of *Cousins* suggest that the principal concern of the Court was the injunction which was so broad in scope that the associational rights of Illinois citizens and the National Party were completely swept aside. *Cousins* should be viewed as a decision which voided an all-encompassing state court injunction.[13] The Court did not hold that National Party rules could overturn state or federal election laws which relate to the qualifications of voters. That is the specific point made in the concurring opinions.

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[13] Illinois law directly created a delegation to the National Convention which violated practically every objective of the National Party. Wisconsin law is only directed to voter qualifications. It does not regulate the actual election of delegates.

> "[R]espondents overlook the significant fact that the suffrage was exercised to elect delegates to a National Party Convention." 419 U.S. at 489.

Subsequent opinions interpreting *Cousins* have shed some light upon its meaning. In *Marchioro* v. *Chaney,* 442 U.S. 191 (1979), the Court held that states were empowered to direct major political parties to create central committees and to grant to these statutorily created committees certain limited but important functions. The Court said:

> "The requirement that political parties form central or county committees composed of specified representatives from each district is common in the laws of the States. These laws are part of broader election regulations that recognize the critical role played by political parties in the process of selecting and electing candidates for state and national office. The State's interest in ensuring that this process is conducted in a fair and orderly fashion is unquestionably legitimate; 'as a practical matter there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.' *Storer* v. *Brown,* 415 U.S. 724, 730. That interest is served by a state statute requiring that a representative central committee be established, and entrusting that committee with authority to perform limited functions, such as filling vacancies on the Party ticket, providing for the nomination of presidential electors and delegates to national conventions, and calling state-wide conventions. Such functions are directly related to the orderly participation of the political party in the electoral process." 442 U.S. at 195-197.

With respect to *Cousins,* the Court commented on its scope in a footnote at the end of the opinion as follows:

> "*Cousins* v. *Wigoda,* 419 U.S. 477, upon which appellants place their primary reliance, does not support their claim here. In *Cousins,* unlike this case, there was a substantial burden on associational freedoms. This fact alone distinguishes the two cases and renders *Cousins* inapposite." 442 U.S. at 199 n. 15.

Likewise, in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Court, in upholding most aspects of the Federal Election Law, cited *Cousins* in the following passage:

> "As the general discussion in Part I-A, *supra,* indicated, the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association. The Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom,' *Kusper* v. *Pontikes,* 414 U.S. at 57, that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.' *Shelton* v. *Tucker,* 364 U.S. 479, 486 (1960). See, e.g., *Bates* v. *Little Rock,* 361 U.S. 516, 522-523 (1960); *N.A.A.C.P.* v. *Alabama, supra,* at 460-461; *N.A.A.C.P.* v. *Button,* 371 U.S. at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' *N.A.A.C.P.* v. *Alabama, supra,* at 460-461. Yet, it is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.' *C.S.C.* v. *Letter Carriers,* 413 U.S. 548, 567 (1973). Even a '"significant interference"' with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms. *Cousins* v. *Wigoda,* 419 U.S. at 488; *N.A.A.C.P.* v. *Button, supra,* at 438; *Shelton* v. *Tucker, supra,* at 488." 424 U.S. at 24-25.

It is abundantly clear that states indeed have significant power to regulate all elections. *Cousins* does not destroy that power. *Buckley,* citing *Cousins,* held that associational rights are not absolute. They are subject to narrowly drawn regulations which do not unduly interfere with important associational privileges as long as the

regulation advances a recognized legitimate state interest. Thus, it appears that the *Cousins* decision was principally prompted by the fact that a state court had attempted to directly prevent certain persons from becoming delegates to a national convention. *Cousins* did not hold that states were completely powerless to regulate voter qualification in Presidential preference primaries.

This was the precise holding of Judge Frankel in *Fallon* v. *State Board of Elections of the State of New York,* 408 F.Supp. 636 (S.D. N.Y. 1976). The court stated in the body of its opinion:

> "Read most liberally in plaintiffs' favor, *Cousins, supra,* held no more than that the policy of a national political party in *setting qualifications for delegates* to its convention may, in some circumstances, prevail over contrary state law." 408 F.Supp. at 638. (Emphasis supplied).

The court's footnote in conjunction with that statement is even more to the point:

> "A fairer reading of *Cousins* probably does not go even this far. There, a state court enjoined the plaintiff-delegates who were not elected in the state primary from being seated at the 1972 National Democratic Convention after the Credentials Committee had refused to seat those delegates who were elected in the primary on the ground that certain slate-making procedures required by the Party's charter were not complied with. The plaintiffs appealed to the Supreme Court and took their seats in violation of the injunction. While contempt proceedings were pending, the Supreme Court reversed the state injunction, holding that it violated plaintiffs' right of freedom of political association. As Justice Rehnquist pointed out in his concurring opinion, the operation of the state injunction 'was as direct and severe an infringement of the

> right of association as can be conceived.' 419 U.S. at 491-92. Whether the *Cousins* decision can thus be read to hold that any national party rule overrules a contrary state election requirement is at best questionable." 408 F.Supp. at 638 n. 3.

Cousins is hardly an all-encompassing decision which sweeps away all state regulation of those parts of the electoral process which relate to Presidential candidate selection. The Court was primarily concerned with a broad injunction which "was a direct and severe infringement" upon fundamental associational rights and privileges. *Cousins,* 419 U.S. at 491-92. Even if the Wisconsin law is found to affect some associational right of the National Party, this narrowly drawn state regulation is properly enforceable. States still maintain their historic role of insuring that elections are "conducted in a fair and orderly fashion." The Wisconsin Open Primary law is not unconstitutional merely because it conflicts with some rule of the Democratic Party of the United States.

III.

IF THE STATE HAS THE POWER TO CONDUCT AN OPEN PRIMARY, IT HAS THE POWER TO MAKE THE RESULTS OF THE PRIMARY EFFECTIVE.

Perhaps the real issue in this case is not whether Wisconsin can conduct an open primary, but rather whether it can make the results of the open primary binding upon Wisconsin delegates to the National Convention. In this respect, the mandate of the Wisconsin Supreme Court is also very limited.

Unlike *Cousins* v. *Wigoda,* the Supreme Court of Wisconsin did not prohibit the National Party from seating any particular delegation. The Wisconsin law and the

Wisconsin Supreme Court did not regulate the composition of the Wisconsin delegation. All that the Wisconsin Supreme Court directed was that no delegation could be refused credentials at the Democratic National Convention solely on the ground that the apportionment of the delegation was in accordance with the results of the Wisconsin Open Primary. This is a very narrow and closely drawn judicial requirement which merely enforces the limited purposes of the Wisconsin law. It merely makes that law effective without any actual impairment of the National Party's First Amendment rights.

A state has the power to enforce its election laws. The Court stated in *Storer* v. *Brown, supra*:

> "As we indicated in *Rosario,* the Constitution does not require the State to choose ineffectual means to achieve its aims." 415 U.S. at 736.

The Court was reaffirming its approval of the opinion of the Court of Appeals in *Rosario* v. *Rockefeller,* 458 F.2d 649, 654 (2nd Cir. 1972) when it stated:

> "In requiring that the State use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require ineffectual means." See *Rosario* v. *Rockefeller,* 410 U.S. 752, 762 n. 10 (1973).

Likewise, Wisconsin is not required to helplessly hope that the National Party will honor Wisconsin law. A closely drawn injunction makes the Wisconsin law effective in a manner which does not impair any First Amendment right claimed by the National Party.

CONCLUSION

On the basis of the foregoing, it is respectfully requested that the Court affirm the judgment and mandate of the Wisconsin Supreme Court.

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Respectfully submitted,

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APPENDIX

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(Quoted from Research Bulletin, 75-RB-1, at 7-8)

Chapter 451, Laws of 1903, provided that all candidates for partisan elected office would be chosen in primary elections. Although this law would have allowed the popular election of delegates to national political conventions, this was not specifically required. As remains true today, this was an open primary.

Chapter 369, Laws of 1905, specifically required that delegates to national political party conventions be elected in primaries. Under this law, prospective delegates stated no preference either on the nomination papers or the ballot for any prospective presidential candidate. In other words, the voter cast his ballot for individual delegates, not for any preferred presidential candidate.

Chapter 512, Laws of 1907, provided that alternates for the popularly elected delegates to the national political conventions were to be selected by the statutory central committees of the Wisconsin political parties, rather than from the runners-up in the delegate election.

Chapter 300, Laws of 1911, added the "presidential preference" feature to Wisconsin's presidential primary. In addition to voting for the delegates to the national political conventions, voters were also permitted at the same election to express a preference for the various possible contenders for presidential nomination. However, the law said nothing as to whether the results of

the presidential preference ballot would bind or commit the delegates elected at the same time, and there was nothing on the ballot which linked the delegate selction process with the presidential preference ballot. The law specifically stated that the names of presidential nomination aspirants could be placed on the ballot without their consent. Oregon adopted the presidential preference plan in 1910, followed in 1911 by Wisconsin, Nebraska, New Jersey and North Dakota.

Chapter 22, Laws of the Special Session of 1912, provided that candidates for the positions of delegate to the national conventions could identify themselves on the ballot with the name of a particular presidential aspirant or with a particular principle. However, there was still no direct connection between a vote for a presidential contender in the presidential preference contest and a vote for a candidate for delegate linked with the presidential contender's name. The delegate was not legally bound, as he is today, to support a particular candidate at the party's national convention. In addition, the law did not permit delegate election by "slates" of candidates, preferring a certain presidential candidate. All delegates had to be voted for individually.

Thus, the Attorney General held in 1924 that a "presidential preference primary and national party convention delegate ballot marked by (the) voter for one of (the) candidates for president and with no other marks cannot be counted as a vote for candidates who appear on (the) ballot designated as favoring such candidate for president. Candidates for delegates must be voted for separately and individually." (13 Atty. Gen. 184)

Chapter 139, Laws of 1933, took legal notice of the fact that it was each national political party's prerogative to

determine the number of convention votes allocated to each state. The 1905 primary law had provided for the election of a specific number of delegates (2 per congressional district, 4 at large) from the Wisconsin party organizations to the national convention. The law was changed so that the required number of delegates would be elected in the primary.

Chapter 406, Laws of 1949, established a direct link between the presidential preference ballot and delegate selection by providing for the election of candidate-committed slates of delegates. The law restructured the ballot form to list delegates' names under a candidate's name and limited the number of delegates per candidate to the number to be elected. Individuals could become delegates either by filing nomination papers as in the past or by being on a certified slate of candidates entered by the presidential candidate. The 1949 law also made another amendment to the presidential primary statutes. At the time that a proposed presidential candidate entered a slate of delegates pledged to him the law required him to sign a sworn affidavit stating that he intended to become a candidate for the presidential nomination at the national convention for which the delegates were being selected. In addition, the law required the delegate to sign an affidavit stating that he would support the candidate on the first ballot and upon all additional ballots unless released by the candidate or unless the candidate received less than ten percent of the convention vote on any ballot.

Chapter 689, Laws of 1951, required that a presidential candidate's certified list of delegates was to take preference over delegates filing nomination papers.

Chapter 90, Laws of 1967, eliminated the names of prospective delegates from the primary ballot. Delegates were to be chosen under the present system described at the beginning of this section. The law also gave the voter the option of voting for "none of the names shown" as a means of indicating his dislike of all potential candidates listed on the party ballot. It was believed that this would reduce the frequency of crossover voting by allowing voters to protest the absence of an acceptable candidate on their party's ballot. Chapter 90 also increased from one-tenth to one-third the share of convention votes that a candidate must receive on any single ballot in order to maintain the commitment of delegates pledged him under the Wisconsin primary.